Supreme Court, U.S.
FILED
AUG 17 1999
OFFICE OF THE CLERK

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No. 99-1-00123

In the Supreme Court of the United States

OCTOBER TERM, 1999

LAZY OIL CO.; JOHN B. ANDREASSI;
THOMAS A. MILLER OIL COMPANY, *et al.*,

Petitioners,

v.

WITCO CORPORATION; QUAKER STATE CORPORATION;
QUAKER STATE OIL REFINING CORP.; PENNZOIL COMPANY; AND
PENNZOIL PRODUCTS COMPANY

WYNNEWOOD DRILLING ASSOCIATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent states that it has no parent companies or non-wholly-owned subsidiaries.

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QUESTIONS PRESENTED

1. Whether the District Court acted within its discretion in approving the Pennzoil/Witco Class Action Settlement where the litigated Class consisted of direct sellers of "Penn-Grade" Crude Oil.

2. Whether the District Court acted within its discretion in denying an eleventh-hour Motion for Certification of a Subclass where there was no factual showing of antagonism among Class members.

3. Whether the District Court acted within its discretion in refusing to disqualify Class Counsel.

I. STATEMENT OF THE CASE

In the spring of 1994, three class action complaints were filed, alleging that defendants fixed the price at which they purchased Penn Grade crude oil (crude from the western side of the Appalachian basin). In the fall of 1994, a fourth plaintiff, Wynnewood Drilling Associates, filed a similar class action, which was consolidated with the other actions. The complaints sought certification of a class of all persons who directly sold Penn Grade crude to one or more of the defendants in the period from January 1, 1981 to the date of commencement of the action. Throughout the course of the litigation, the class definition never changed. From the start, this consolidated case was maintained on behalf of direct sellers of Penn Grade crude. The size of the class did not change at all as a result of the filing of the *Wynnewood Drilling* Complaint.

On June 30, 1995, pursuant to Fed. R. Civ. P. 23(b)(3), the District Court certified the cases as a class action on behalf of a class consisting of all "direct sellers of Penn Grade crude" to Defendants between January 1, 1981 and June 30, 1995.

On or about December 12, 1995, the Class and Defendant Quaker State Corporation entered into a Class settlement in the amount of $4.4 million. The Quaker State Settlement was approved on June 13, 1996, after notice to the Class and a hearing.

For more than two and a half years, the opposing parties engaged in motion practice and extensive discovery, including the review and analysis of hundreds of thousands of documents, and extensive expert discovery. In mid-January 1997, an Agreement of Settlement

between Plaintiff Class and Pennzoil Company, Pennzoil Products Company, and Witco Corporation was reached in the amount of approximately $15 million.

Notwithstanding the fact that Class Counsel believed the settlement was in the best interests of the Class in light of the relevant factors, three of the class representatives opposed the settlement. As a result of the conflict of interest that developed, Class Counsel moved to withdraw as counsel for the opposing class representatives. The District Court granted Class Counsel's Motion to Withdraw with regard to plaintiffs Miller Oil Co., John Andreassi, and Lazy Oil Co. ("Petitioners"). Wynnewood Drilling, the other class representative, continued to support the settlement. Thereafter, new counsel entered their appearances for Petitioners.

The Settlement Notice informed Class members about the Pennzoil/Witco Settlement, the steps they could take with respect to it, and the fact that the Court would hold a hearing to determine whether the settlement was fair, reasonable and adequate. The Notice also informed the Class that some of the class representatives opposed the settlement.

The District Court held an extensive fairness hearing on April 23 and 28, and May 13, 1997. At the fairness hearing, all objectors were permitted to be heard and to present evidence in support of their objections. All witnesses were subject to cross-examination. In addition, the District Court received affidavits of 17 persons, and other evidentiary materials.

Several months later, on December 31, 1997, the District Court issued a 113-page Memorandum and Opinion, and Order approving the Pennzoil/Witco Settlement Agreement, denying Objectors' Motion for a Subclass, and denying Objectors' Motion to Remove and Disqualify Class Counsel.

After hearing oral arguments, on February 2, 1999, the Third Circuit Court of Appeals affirmed the District Court in an opinion authored by Chief Judge Edward Becker. The Third Circuit later denied the Petitioners' Motion for Rehearing En Banc.

II. SUMMARY OF ARGUMENT

The case before this Court concerns a class action settlement of a price-fixing claim against two refiners of Penn Grade crude oil, Pennzoil and Witco. The settlement provides a recovery of $14.5 million, plus $250,000 for administrative expenses, plus certain injunctive relief for the Class. A previous settlement was reached with a third defendant refiner, Quaker State. Combined with the earlier settlement with Quaker State, the class recovered a total of $18.9 million, approximately 27% of damages during the statute of limitations period. If many of the factors advanced by defendants' experts were also taken into account, these two settlements would represent 65-76% of such potentially recoverable damages. The Pennzoil/Witco settlement was reached after extensive discovery, the exchange of experts' reports, and depositions of the parties' experts. There were also serious questions as to whether plaintiffs could prove that there was a conspiracy to fix prices. The defendants contended that the parallel prices could be readily explained by the oligopsony nature of the market. The District Court was

also fully involved in this litigation and in consideration of the Settlement. In connection with the Settlement, the District Court held an evidentiary hearing that lasted three days. Several months following the last hearing day, the District Court issued its Findings of Fact and Conclusions of Law, and Memorandum Opinion approving the Settlement. All of the Findings of Fact were amply supported by the record. In approving the Settlement, the District Court considered all of the relevant settlement factors and acted well within its discretion. On their appeal to the Third Circuit, Petitioners failed to demonstrate that any of the District Court's findings were clearly erroneous.

Petitioners' main challenge to the Settlement is that a lost profits damage estimation should have been used, instead of the price-differential method traditionally used in price-fixing cases and the method used by plaintiffs in this case. Under the price-differential damages estimation method, one compares the prices that would have been paid absent the alleged conspiracy with the prices that were actually paid. Further, even assuming that the lost-profits measure could have been used in the class context, the unrebutted expert testimony at the fairness hearing established that the price-differential methodology captured substantially all of the damages that could have been estimated under the lost-profits methodology. Findings of Fact Nos. 49 and 50.

Petitioners also sought to certify a subclass comprised of small producers of Penn Grade crude. The District Court properly denied Petitioners' Motion for a Subclass. Such a class was improperly defined by Petitioners because it consisted of indirect sellers of Penn Grade crude. Further, the class of all direct sellers of Penn Grade crude

was properly certified because, among other things, there was no antagonism among the class with respect to their claim that they were underpaid for their crude. The District Court found that there was no valid distinction between so-called producers and investors for purposes of this litigation. The Third Circuit agreed with that finding. Classes of direct sellers or direct purchasers are regularly certified in horizontal price-fixing cases such as this. None of the conflicts identified in *Amchem* existed in this price-fixing case.

The District Court and the Third Circuit also properly determined that Class Counsel did not need to withdraw from representation of the Class because of the disagreement that arose between Class Counsel and some of the Class representatives concerning the adequacy of the settlement.

In sum, the Petition for Writ of *Certiorari* should be denied because the asserted errors consist of allegedly erroneous factual findings. There is no need for this Court to grant *certiorari* in order "to insure [as Petitioner argues] that the guiding principles" of *Amchem Products, Inc. v. Windsor* are clearly understood to apply in other than "settlement only situations." Both the District Court and the Third Circuit had a keen understanding of the *Amchem* principles. Chief Judge Edward Becker, the author of the Third Circuit decision in this matter and the author of its decision in *Amchem*, certainly understood that a class action settlement must be scrutinized to ensure that all class members are treated fairly. Further, the Third Circuit did not "eschew" any discussion of Rule 23(a) and (b), or due process in its analysis of Petitioners' claim that there was intra-class antagonism that should have precluded approval of the class settlement. The

Third Circuit specifically found that the "objectors' distinction between producer and investor class members is not supported by the record in this case.

III. ARGUMENT

A. The District Court Acted Within Its Discretion in Approving the Settlement and Finding There Were No Intra-Class Antagonisms

Petitioners' opposition to the settlement is primarily based on the belief that estimated class damages should have taken into account, not just the differential between the conspiratorial and the competitive price, but also lost profits resulting from the depressed prices. The District Court carefully considered this objection and correctly found it to be seriously flawed. Conversely, the District Court found that the price-differential method employed by Plaintiffs' expert "is widely used and accepted as a valid approach for calculating damages." Findings of Fact No. 45.

The lost profits theory of damages espoused by Petitioners was not susceptible to common class-wide methods of proof in this case. Application of the theory would have required thousands of mini trials to determine the lost profits of each Class member. The use of such a "lost profits" model would have required individualized inquiry into each Class member's access to sites for development of new wells, likely production rates and operating costs, drilling costs and lifting costs. Moreover, after carefully considering the testimony of Plaintiffs' economic expert and the objectors' experts, the Court concluded that the objectors failed to "provide any reasonably reliable

evidence . . . that under their lost profits theory, damages suffered by the Class could be accurately determined on a Class-wide basis." Findings of Fact No. 59.

In addition, to the extent that some producers drilled new wells and increased their production, those producers with new production closer to defendants' refineries would likely be favored producers because of lower transportation costs. Thus, under the lost profits method, there would be an intra-class conflict between producers in close proximity to Defendants' refineries and those farther away. Petitioners' proposed methodology, as correctly found by the District Court, was not suitable for class treatment.

Moreover, even assuming that the lost-profits measure could have been used, the uncontroverted evidence at the settlement hearing showed that the price-differential model calculated the "vast bulk" of the Class's damages in the case, and was a "substantially complete" model. Findings of Fact No. 49.

B. The Settlement Complied Fully With Due Process and the Requirements of *Amchem*

Petitioners also contend that the District Court erred as a matter of law in approving a settlement that included both producers actively engaged in the business of oil production and investors. As the Third Circuit stated:

> The District Court found this purported distinction was unsupported by the facts of the case, was not relevant to the class claims (which were brought on behalf of "sellers,"

> not producers or investors), and was raised at an extremely late point in the litigation. We agree.

A-14. *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 588 (3d Cir. 1999).

The fact that the certified class consisted of direct sellers that included persons with drilling rights or working interests (individual producers); landowners (the one-eighth interest holders); and partnerships with working interests, did not create an intra-class conflict of the type in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 626-34 (3d Cir. 1996), *affirmed sub nom. Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231 (1997).

This case is not *Amchem*. In *Amchem*, the Third Circuit found, and this Court affirmed, that the class representatives could not adequately represent the "future plaintiffs" because of the strong tension between those who wanted large pay-outs up-front and those who wanted the up-front pay-outs reduced to allow for large pay-outs when the claims of future plaintiffs matured. *Amchem*, 83 F.3d at 630. There were other conflicts between the present and future *Amchem* plaintiffs, including the alternative dispute mechanism that would have frozen in place the science of 1993. *Id.*

This Court described the *Amchem* settlement class as the most sprawling class ever brought to its attention and too unwieldy to satisfy the predominance test. *Id.* at 2250. In the same opinion, this Court noted that the predominance test is readily met in certain cases alleging violations of antitrust laws. *Id.* This horizontal price-fixing case is such a case. It does not conflict with *Amchem*.

Petitioners' efforts to portray the class certified for litigation in this case as a sprawling class with strong tensions over the division of the settlement fund was properly rejected by the District Court and the Third Circuit. All of the class representatives here were properly found "adequate" to represent the class pursuing price-fixing claims. Moreover, while in *Amchem* there was antagonism over the amounts of money to be allocated to various groups, the settlement funds in this case were deposited into a single fund for disbursement in direct proportion to Class members' sales to defendants.

C. The Motion for a Subclass Was Properly Denied

The District Court also correctly declined to create a subclass consisting of small producers of Penn Grade crude. Contrary to Petitioners' assertion, Class Counsel did contest the Petitioners' claim that there was antagonism among Class members over the relief requested.

In a price-fixing case such as this, there is no Rule 23 antagonism among Class members seeking the recovery of under-payments. That some of the Class members are small producers, large producers, or limited partnerships creates no conflict. Each Class member is entitled to its pro-rata share of any recovery of under-payments made by the defendants. Moreover, there is no problem in allowing owners of royalty interests to participate in the Class. They are also direct sellers, and, as such, their one-eighth interests should be recognized.

The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining

whether . . . maintenance of a class action is economical and whether the named plaintiffs' claim and the class claims are so interrelated that the interests of the Class members will be fairly and adequately protected in their absence." *Windsor*, quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). In the instant case, the named plaintiffs' claims and their damages theory were plainly interrelated with those of all Class members. There was no need for a subclass.

In *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), the Fourth Circuit reversed the certification of a class of Meineke franchisees who sought to recover lost profits as a result of the franchisor's alleged wrongdoing. According to the Court, the class claim for lost profits was "not a natural candidate for class-wide resolution." The "calculation of lost profits is too 'dependent upon consideration of the unique circumstances pertinent to each Class member.' [T]he profits lost by franchisees also differed according to their individual business circumstances." *Id.* at 342. Here, too, because a lost profit analysis would require "separate inquiries into individual business relationships," the District Court properly rejected the Motion for a Subclass.

Petitioners' proposed subclass also did not satisfy the requirement that the class representatives fairly and adequately protect the interests of the subclass. Lost profits could only be demonstrated by showing the effect Defendants' actions had on each subclass member's business operations. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977). The District Court properly found that, because the market for Penn Grade crude was limited and members of the proposed subclass were competitors, one member's ability to prove lost profits or lost

business would come at the expense of another member's ability to do the same. Moreover, not all producers are necessarily direct sellers and any found to be indirect sellers would lack standing to bring claims. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

D. Class Counsel Acted Ethically By Not Abandoning the Class

Petitioners' Claim that Class Counsel had an impermissible conflict of interest hinges upon their claim that there was intra-class antagonism. For the reasons discussed in the preceding sections, no such conflicts existed. The District Court found that Class Counsel acted responsibly and in the best interests of the Class as a whole. The District Court also found that Class Counsel kept Petitioner Lazy Oil advised of the settlement discussions. Findings of Fact Nos. 83, 305 and 307.

Moreover, the Third Circuit properly held that the difference of opinion that developed between Class counsel and three of the Class representatives did not *per se* require the automatic disqualification of Class Counsel. *Lazy Oil Co.*, 166 F.3d at 588-89.

The Third Circuit, drawing on Second Circuit precedent properly held that "class counsel may continue to represent the remaining class representatives and the class, as long as the interest of the class in continued representation by experienced counsel is not outweighed by the actual prejudice to the objectors of being opposed by their former counsel." *Id.* at 589, A-17.

IV. CONCLUSION

Based upon the foregoing, the Petition for a Writ of *Certiorari* should be denied.

Dated: August 17, 1999

Respectfully submitted,

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